

STATE OF MICHIGAN
COURT OF APPEALS

In re BENJAMIN JOHN AZZAR LIVING TRUST.

MARY A. ELLIS,

Petitioner-Appellee,

v

JAMES D. AZZAR, JR., TRUSTEE,

Respondent-Appellant.

UNPUBLISHED

December 18, 2003

No. 238476; 241119; 243766

Kent Probate Court

LC No. 01-171340-TI

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

These appeals have been consolidated from three separate orders of the probate court. In Docket No. 241119, the probate court removed respondent as trustee and ordered him to pay attorney's fees to petitioner. In Docket No. 238476, the probate court modified the trust to allow a final distribution of trust assets. In docket No. 243766, the probate court awarded respondent a fee as the acting trustee. We affirm Docket Nos. 238476 and 243766. In Docket No. 241119, we affirm in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion.

These cases arose from a dispute involving matters outside the context of the trust, but apparently within the context of a feuding family. Respondent has been trustee of the Benjamin John Azzar Living Trust for a number of years. During his tenure as trustee, respondent built the trust from \$267,000 in assets in 1982 to over \$3,000,000,000 in assets in 2001. Despite respondent's apparent success, a dispute arose between the parties as to another family member, which seemingly precipitated an action to remove respondent as trustee and to pay the remaining balance of the trust to the beneficiaries. Additionally, respondent was alleged to have broken his fiduciary duty to the trust by failing to file an accounting. After due consideration of the parties' arguments, we affirm the probate court's order removing respondent as trustee but reverse the probate court's order holding respondent liable for petitioner's attorney's fees. Additionally, we hold that the respondent is entitled to a trustee's fee. Finally, we hold that respondent lacks standing to challenge the probate court's order modifying the trust to allow a final distribution of trust assets.

Respondent argues that the probate court abused its discretion by removing him as trustee. We disagree for the reasons set forth below.

A probate court's decision to remove a trustee is reviewed for an abuse of discretion. *Comerica Bank v Adrian*, 179 Mich App 712, 729; 446 NW2d 553 (1989). An abuse of discretion will be found where the result "is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *In re Estate of Weber*, 257 Mich App 558, 560-561; 669 NW2d 288 (2003).

In addition, MCL 555.26 provides:

Upon the petition or bill of any such person interested in the execution of an express trust, and under such regulations as shall be established by the court for that purpose, the court of chancery may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or who, for any other cause, shall be deemed an unsuitable person to execute the trust.

This Court summarized the duties of a trustee in *In re Green Charitable Trust*, 172 Mich App 298, 312; 431 NW2d 492 (1988):

In general, the duties imposed on the trustee are determined by consideration of the trust, the relevant probate statutes, and the relevant case law...A claimed breach of duty and any resulting liability is tested by the facts of each case. . . .

The standard of care expected of a trustee is that of "a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills." MCL 700.813. To be prudent includes acting with care, diligence, integrity, fidelity and sound business judgment In addition, the courts have imposed on the fiduciary duties of honesty, loyalty, restraint from self-interest and good faith. [*Id.* at 312-313 (citations omitted).]

The Court further stated:

Giving trustees discretionary or broad powers does not mean that there are no limits to those powers. Trustees' actions will be reviewed for abuse of that discretion. The trustee is bound to exercise his discretion honestly and in good faith. [*Id.* at 313 (citations omitted).]

Here, the probate court determined that respondent violated his duties as trustee when he collected a trustee's fee for the purpose of exerting leverage over the prospective beneficiaries in the Salma Missad matter. The probate court also found that he did so after seventeen years of

keeping his promise to the grantor that he would not charge a fee. Additionally, he ignored the probate court's order to return the fee for several months, while interest accrued on the margin account, and he ultimately complied only when he faced arrest for contempt of court. The court found that respondent also ignored the trust's annual accounting requirement, although this was not a significant factor in the court's decision. These findings are supported by the record.

Under these circumstances, the probate court did not abuse its discretion by removing respondent as trustee. By using his powers for his own ends, respondent clearly abused his authority and violated his fiduciary obligations by injecting himself into an unrelated family quarrel. Although paying himself a fee occurred after seventeen years of exceptionally successful investment, given the timing of the decision, it was sufficient to call into question respondent's loyalty and good faith. *In re Green Charitable Trust, supra*, 312-313. Respondent's skill as an investor is of limited value if beneficiaries cannot trust him to use his powers solely for their benefit. Respondent further demonstrated his lack of credibility by flouting the probate court's order (with interest mounting in the margin account) until he actually faced arrest. By this time, it was evident that the respondent was no longer acting in accord with the principles this Court has set forth for fiduciaries.

Respondent does not actually defend his actions, but rather argues that they did not justify his removal. He downplays his failure to provide accountings by arguing that the beneficiaries never complained or sought more information. However, this failure was only a secondary reason for the probate court's decision. Respondent maintains that his actions regarding the fee should not be viewed as "blackmail" because he was entitled to a fee and, therefore, "had every right to do with that fee what he wanted." Finally, respondent contends that his "segregation" of the fee amount was acceptable because he believed, at the time, that the trust would soon be distributed. He acknowledges that "there was some delay in returning the segregated funds," but avers that he did return them with interest. Nonetheless, respondent's self-serving characterization of these events does not demonstrate that the probate court's interpretation of the evidence was erroneous.

Respondent also argues that the Missad dispute is irrelevant to his service as trustee and shows nothing other than petitioner's personal animosity toward him. Again, this description of events that fails to undermine the probate court's proper exercise of discretion granted to it by statute and case law. Having used the trust and his authority as trustee to immerse his opinions into the Missad dispute, respondent cannot now claim that the two disputes are unrelated or that petitioner was motivated solely by "personal animosity." Therefore, the probate court did not err in finding that respondent abused his authority as trustee and caused both the probate court and the beneficiaries to lose faith in his loyalty. Accordingly, the decision to remove him as trustee was not an abuse of discretion.

Finally, respondent argues that the probate court lacked authority to award petitioner attorney's fees for her action to remove him as trustee. We agree.

This issue challenges the probate court's legal authority to award attorney's fees. Whether a court has authority to award attorney's fees is a question of law reviewed de novo on appeal. *Terra Energy, Ltd v State*, 241 Mich App 393, 397; 616 NW2d 691 (2000).

This Court held in *In re Thomas Estate*, 211 Mich App 594, 602; 536 NW2d 579 (1995),

this Court held:

Attorney fees are not recoverable unless expressly authorized by statute or court rule There is no express statutory authorization permitting assessment of attorney fees in this case.

An exception to the general rule exists when the party seeking attorney fees as damages has been forced to expend money to prosecute or defend a prior lawsuit because of the wrongful acts of the third party This exception is not applicable to this case because the bank [trustee] is not a third party, the action filed by petitioner does not constitute a prior lawsuit, and the bank's conduct was not wrongful as that term has been interpreted by this Court Accordingly, we reverse the award of attorney fees. [*Id.*, citations and footnote omitted.]

MCL 555.26, the statute governing removal of a trustee, does not provide for attorney fees, and this action does not involve a prior lawsuit or wrongful acts by a third party. *Id.* at 602. Because there is no express authorization for attorney fees, we conclude that the probate court erred in its decision to award petitioner attorney fees.

Petitioner suggests that attorney fees were authorized by MCR 2.114 and MCR 5.114. These rules authorize sanctions, including attorney fees, against attorneys and parties who sign pleadings knowing there is no legitimate legal basis for the pleading or interposing it for an improper purpose. Petitioner did not move for sanctions under either of these rules, however, nor did the probate court explicitly or implicitly invoke either rule in its order. Because these rules are not applicable to the instant case, they do not provide a basis for affirming the attorney fee order. We therefore reverse the probate court's order to the extent it awards petitioner attorney fees but affirm the order as to removing respondent as trustee.

II. Docket No. 238476

Respondent challenges the probate court's order modifying the trust pursuant to MCL 700.7207 to allow a distribution of the trust corpus to petitioner and her children. Petitioner challenges respondent's standing to appeal this matter, given that he has been removed as trustee.

MCR 2.201(B) generally requires that an action be prosecuted in the name of the real party in interest, but MCR 2.201(B)(1) provides an exception for a "trustee of an express trust." MCL 600.2041 similarly provides that "[e]very action shall be prosecuted in the name of the real party in interest," but also provides an exception for a trustee of an express trust. Because respondent was removed as trustee on April 10, 2002, and because we affirm that order, we conclude that respondent is not a real party in interest for purposes of appealing this issue.

The real party in interest rule is closely related to the standing doctrine. This Court held in *City of Kalamazoo v Richland Twp*, 221 Mich App 531, 534; 562 NW2d 237 (1997):

A real party in interest is the one who is vested with the right of action on a given claim, although the beneficial interest may be in another. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). This standing

doctrine recognizes that litigation should be begun only by a party having an interest that will assure sincere and vigorous advocacy. *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). In addition, the doctrine protects a defendant from multiple lawsuits for the same cause of action. *Kearns v Michigan Iron & Coke Co*, 340 Mich 577, 581; 66 NW2d 230 (1954).

The standing doctrine applies to appeals as well as trial court actions. See *Winters v National Indemnity Co*, 120 Mich App 156, 159; 327 NW2d 423 (1983) (holding that a defendant lacked standing to appeal summary judgment in favor of a codefendant where the defendant did not file a cross-claim against the codefendant and the plaintiff accepted the probate court's ruling).

Because respondent has been relieved of all duties pertaining to the trust, he no longer has any right of action with regard to the trust or any interest in its legal status. Consequently, he has no standing to appeal the order adjusting the beneficial interests.

III. Docket No. 243766

MCL 700.7401(2)(s) provides that a trustee has the power "[t]o pay a tax, an assessment, the trustee's compensation, or another expense incident to the administration of the trust."¹ In *Comerica Bank, supra* at 724, this Court set forth twelve factors to be considered in determining the reasonableness of a trustee's fee:

(1) the size of the trust, (2) the responsibility involved, (3) the character of the work involved, (4) the results achieved, (5) the knowledge, skill, and judgment required and used, (6) the time and the services required, (7) the manner and promptness in performing its duties and responsibilities, (8) any unusual skill or experience of the trustee, (9) the fidelity or disloyalty of the trustee, (10) the amount of risk, (11) the custom in the community for allowances, and (12) any estimate of the trustee of the value of his services.

The Court further stated that "[t]he weight to be given any factor and the determination of reasonable compensation is within the probate court's discretion." *Id.* at 724. The court "must consider the circumstances of the case in determining which factors are to be given weight." Here, the probate court gave weight to respondent's failure to perform his duty of providing annual accountings and, to a lesser extent, to his lack of fidelity regarding the Missad matter. The probate court declined to give weight to the results achieved, noting that there was no evidence that corporate trustees received bonuses (or penalties) based on their results. Actually one could argue that the opposite is true. We do not find an abuse of discretion in this weighing of factors.

¹ Formerly, MCL 700.541 provided that a trustee was entitled to "just and reasonable compensation for services rendered." See *Comerica Bank, supra*, at 723. This statute has been repealed.

Respondent contends that the probate court should not have reduced his fee based on failure to provide annual accountings because he has been ordered to provide the accountings and is left uncompensated for complying with the order. We find this argument unpersuasive. Respondent failed to perform an essential function as trustee and began to fulfill it only after the probate court ordered him to do so. Under these circumstances, we see no reason why his belated, court-ordered compliance should protect him from penalty under factor (7). Although respondent's perspective on this argument is not entirely unreasonable, it was not an abuse of discretion for the probate court to reject it.

Respondent also contends that the probate court abused its discretion by denying him a premium for outstanding investment results. Although respondent's expert opined that the trust's dramatic growth entitled him to a premium, he cites no legal authority that failure to grant one constitutes an abuse of discretion. A party who fails to cite authority in support of his position on appeal waives the argument. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994).

Finally, respondent contends that the probate court should not have taken into consideration his alleged disloyalty to the beneficiaries in the Missad matter. However, this was only a secondary factor in the probate court's decision, which it cited principally to show that respondent did not intend to collect a fee before 2001. Moreover, because breach of loyalty is a significant failing by a trustee, it would not be an abuse of discretion for the probate court to adjust respondent's fee to reflect the breach of loyalty.

We therefore affirm the orders in Docket Nos. 238476 and 243766. In Docket No. 241119, we affirm in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ David H. Sawyer
/s/ Stephen L. Borrello